

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.43 OF 2004

Gopal Bahadur,
presently lodged in
Central Jail Aguada,
Sinkerim, Bardez, Goa

...Appellant

V e r s u s

State of Goa,
Through P.I. Vincy Paes,
Anti Narcotic Cell Police Station
Panaji, Goa.

...Respondent

Miss C. Collasso, Advocate for the appellant.

Mr. S. N. Sardesai, Public Prosecutor for the respondent.

CORAM: N. A. BRITTO, J.

DATE : 6TH OCTOBER, 2005

ORAL JUDGMENT:

This appeal is directed against the judgment/order of the learned Special Judge, N.D.P.S. Court, Mapusa dated 12/16 July, 2004 by which the appellant herein – accused has been convicted and sentenced under Section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the Act, for short).

2. The case of the prosecution, briefly stated, is that the accused was found carrying a consignment of 1015 grams of charas at about 23.00 hrs. near petrol pump at Anjuna, Goa. The raid was conducted upon prior information received by Pw.5/P.I. Vincy Paes of Anti Narcotic Cell Police Station (ANC PS). As per Pw.5/P.I. Vincy Paes, on 14.12.01 at about 19.00 hrs. he had received specific and reliable information that a person of about 22 years of age, strong built, fair complexion would come to deliver consignment of charas to his customer between 23.00 hrs. and 23.30 hrs. near the petrol pump which information he reduced into writing and copy thereof handed over to Pw.6, the then Dy. S.P. Shri D'Souza and thereafter at about 20.00 hrs. he sent a constable to secure panch witnesses and who returned with one Caetano Jose Vaz and Shrikant Lokre/Pw.4, whom he requested to act as panchas and told them about the receipt of the said information and about a copy of the same having been handed over to Pw.6/Dy. S.P. D'Souza and then introduced them to the raiding party and thereafter left the Police Station at about 21.45 hrs. in a police jeep and a private Maruti car alongwith the seal of ANC , Panaji, Goa-1, the kit box containing packing, sealing material, etc. and a typewriter and reached Anjuna at 22.30 hrs. and after parking the vehicle, they concealed themselves near the petrol pump and at about 1.00 a.m. of 15.12.01 they saw a person walking from Vozrant towards Anjuna petrol pump with a polythene bag in his right hand and as his description tallied with the given

description, they surrounded him and identified themselves and asked him for his name and particulars and the said person gave his name as Gopal Bahadur, s/o Singraram Bahadur, presently residing at Arpora, native of Nepal and thereafter he told the accused about the receipt of the reliable information and that he wanted to take a personal search of the bag he was carrying and he told him that the accused had a right to search the raiding party and the panchas including himself, which the accused declined.

3. As per Pw.5, P.I. Vincy Paes, he also told the accused that he had a right to be searched before a Gazetted Officer or a Magistrate of his choice, which offer, the accused declined, whereupon he told the accused to open the polythene bag which the accused was carrying in his hand and on opening the same, they saw blackish substances suspected to be charas, wrapped in polythene wrappers of different cylindrical shapes and he smelt one of them and he suspected it to be charas and then he directed police constable Gawas to weigh the same and they were found to be 1015 grams and he tied a knot to the polythene bag and put in an envelope, packed and sealed the same with 7 seals of ANC PS and then took a personal search of the accused but nothing incriminating was found and when asked the accused whether he had any document to support his possession, and since he had none, he took the accused and the said property in custody and drew a panchanama and a seizure report which were signed by the panchas,

himself and the accused, and copies of the same were given to the accused under his acknowledgment.

4. As per Pw.5/P.I. Vincy Paes, he prepared a letter at the spot addressed to the Director of Food and Drugs Administration on which he affixed the specimen seal impression. He also stated that he prepared a letter addressed to Pw.6, Dy. S.P. D'Souza handing over the seal to him and returned at the Police Station at about 6.00 hrs. with the accused and the seized article and registered the seized article on the muddemal register and at about 9.30 a.m. forwarded the sealed envelope to the office of C.I.D., Crime Branch, Panaji, for onward despatch to the Director of Food and Drugs Administration. As stated by him, from the time he returned to the Police Station with the sealed contraband till the time of despatch to the laboratory, the sealed envelope remained in the locker, under his control. He also stated that he sent intimation – Exh.36 to Dy. S.P. D'Souza as required under Section 57 of the Act.

5. Pw.2/Chandrakant Chowgule stated that he was looking after the work of PSI Shetgaonkar as he was deputed to Gujarat and that on 15.12.2001 constable Padelkar came to him alongwith a letter dated 15.12.05 addressed to Superintendent of Police, Crime Branch, Panaji alongwith a letter addressed to the Director of Food and Drugs

Administration in duplicate bearing the specimen seal impression of the ANC, Panaji, Goa – 1, and one sealed envelope having 7 seals, signatures of the panchas, the I.O. and the accused which letter he inwarded and kept in a locker under his lock and key and thereafter prepared a letter to the Director of Food and Drugs Administration under the signature of Dy. S.P. Kurtarkar and personally went and handed over the sealed envelope and the letter addressed to the laboratory, in the laboratory. Pw.1/Mahesh Kaissare, the Junior Scientific Officer in the Directorate of Food and Drugs Administration stated that the seized article was received on 18.12.01 in the Directorate of Food and Drugs Administration and the seals were in tact, individually covered with a cello tape and the same tallied with the specimen seal impression sent separately on a letter bearing no. PI/ANCPS/2914 dated 15.12.01. According to him, he opened the envelope on 20.12.01, and as stated by him in his analytical report Exh.10, the envelope was containing 1.15 kgs. of dark brown coloured substance consisting of three circular pieces and 13 elongated sticks selected at random as representative sample and analysed by taking about one gram of the substance from each piece and on microscopic examination and other tests, mentioned by him in his report, carried out by him he came to the conclusion that the substance contained charas. As per him, the balance substance alongwith the wrappings and the polythene bag were put back into the envelope which was received and then it was wrapped in a brown

paper, tied with a string and sealed.

6. Pw.3/PSI Shetgaonkar has stated that on 9.1.02 he had received a letter dated 8.1.02 from the office of Directorate of Food and Drugs Administration with report no.32/N/2001 and instructions to collect the balance quantity from his office, which he collected on 9.1.02 and handed over to the Police Inspector vide letter dated 10.1.02.

7. It appears that on or about 13.2.02 the prosecution moved an application – Exh.3 before the learned Special Judge praying that the substance be sent again for weighing the same without wrappers and polythene bag since by then an amendment to the Act was brought about defining the quantities as 'small' and 'commercial' and as a result of the said application, the learned Special Judge vide her order dated 27.2.02 had ordered that the said substance be sent back to the Directorate of Food and Drugs Administration. Pw.1/Kaissare has stated that on 7.3.02 the Director of Food and Drugs Administration had received one brown large paper envelope from the Special Judge, NDPS Court, Mapusa and that the said substance was sent to the laboratory for the purpose of individual weighing of the polythene bag, the wrappers and the substance separately and as such, after weighing the same as ordered, he found that the weight of the dark brown coloured substance was 995 grams, the weight of the polythene

wrappings was 20 grams and the weight of the polythene carry bag was 5 grams and the weight of the substance without wrappings was 970 grams.

8. The learned Special Judge after considering the evidence led by the prosecution found that the prosecution had proved beyond reasonable doubt that the substance recovered from the accused, duly packed and sealed and forwarded to the laboratory through the office of S.P., CID, Crime Branch and analysed by Pw.1/Kaissare was tested positive for charas and thus the case of the prosecution had come full circle against the accused on all the parameters. The learned Special Judge also observed that Pw.1/Kaissare had remained unshaken that the substance in the sealed condition received in the office was sent to him in virgin condition without opening the seals and thus the prosecution had established that the sealed parcel initially forwarded to the Crime Branch for onward despatch was received by him in the same sealed condition with the seals in tact and analysed by him was tested positive for charas and thus from his evidence the element of tampering was ruled out.

13th October, 2005

9. At the time of hearing of this appeal, Ms. Collasso the learned Counsel on behalf of the accused, submits that what was received in the

laboratory and analysed by Pw.1/Kaissare cannot be said to be the same which was attached from the possession of the accused and this on account of the variance of weight of the sample as seized and as analysed. Ms. Collasso further submits that Pw.5/P.I. Paes has spoken falsehood on the aspect of preparation of the letter – Exh.9 which was a letter addressed to the Director of Food and Drugs Administration stating that it was prepared at the spot and if that part of the story of Pw.5, P.I. Paes can be demonstrated to be false, then his entire evidence deserves to be rejected. As regards this submission, learned Advocate Ms. Collasso has relied on several judgments and particularly that of this Court in the case of **Vikram Reddy v. State of Goa (2002(1) Goa L.T. 116)**. Learned Advocate Ms. Collasso has submitted that this case is entirely covered by Vikram Reddy (supra) and therefore the accused deserves an acquittal.

10. At the outset, it is to be noted that we do not follow in this country, the maxim “falsus in uno falsus in onibus”. This maxim has no general acceptance to be followed as a rule of law. It is only a rule of caution and after all it is the duty of the Court to separate the grain from the chaff. The doctrine merely involves the question of weight of evidence to be given in a particular set of circumstances.

11. It appears that the submissions made before this Court were

also made before the learned Special Judge, and, as regards the first submission, the learned Special Judge noted that the accused faced trial on the allegation that he was found in possession of 1015 grams of charas. The learned Special Judge also noted that Pw.1/Kaissare when asked to find out the weight of the substance, dehors the wrappings, on 7.3.02, found that the polythene wrappings weighed 20 grams and the polythene bag weighed 5 grams and the weight of the substance was 970 grams. The learned Special Judge also observed that the total weight of the substance including that taken up for analysis was $970 + 16$ which would be 986 grams. In fact, Shri Sardessai, the learned Public Prosecutor was asked to explain as to how the figure 16 came to be mentioned in the judgment, but neither the learned P.P. nor the learned Counsel appearing on behalf of the accused have been able to throw any light on the same. Without finding out what was the difference in weight, and that too after conviction was recorded, the learned Special Judge noted that the subsequent analysis was done on 7.3.02 which was after a period of three months and this period would have dried up the substance in the ordinary course of nature resulting in loss of moisture and drying of the substance would explain the lower weight as recorded by the Scientific Officer. As regards the preparation of letter – Exh.9 colly with seal impression, the learned Special Judge concluded that Pw.5/P.I. Paes was an Investigating Officer and could well have made a mental note of the preceding crime number and for want of

any contemporaneous record, recording of the crime number in the forwarding letter could not be disbelieved. It appears that the other circumstances pointed out on behalf of the accused for disbelieving Pw.5/P.I. Paes that he had prepared the said letter at the scene, were not taken note of by the learned Special Judge, as submitted on behalf of the accused.

12. The Courts have always frowned upon with the practice of Police Officers keeping the custody of the seal as well as of the seized articles for long in the hands of the same Officer. In other words, a person who has the custody of the seized articles and the seal used to seal the same, should not continue to have both for long because such practices can lead to tampering with the seized article. The Act has taken special care that in normal course after the seizure, the seized drug should be handed over in the custody of the Officer in charge of the nearest Police Station. No such provision is made in case of seal. In this case Pw.5/P.I. Paes has acted exactly opposite. He claims he kept the seized article with himself and the seal, he gave to Pw.6/D'Souza. When the sentence provided is severe, the procedures followed should be beyond suspicion and above board. The Officer having the custody of the seized article and the custody of the seals, should not be the same. All these procedures are required to be followed in order to avoid the possibility of tampering with the sample and to lend

assurance to the Court that in a given case there was no such tampering. This Court in the case of Vikram Reddy v. State of Goa(supra) observed that a witness who is shown to have stated a falsehood to prove a part of the prosecution story, cannot be relied upon. He not only renders his testimony unworthy of acceptance but casts a shadow of doubt on the entire prosecution case and that a Court should never accept the testimony of a witness who is shown to have stated a falsehood and his testimony has to be discarded as a whole.

13. I will first consider the case of the prosecution in relation to the discrepancy in the weight of the sample as found with the accused at the time it was weighed at the instructions of Pw.5/P.I. Paes and the weight as found in the laboratory, by Pw.1/Kaissare. The case of the prosecution as can be seen from the panchanama Exh.28 as well as the seizure report – Exh.29 is that the accused was found with 1 kilo and 15 grams of charas (1.015 kgs. or 1015 grams). The same weight has also been mentioned on Exh.9 colly that it is 1 kilo and 15 grams. However, Pw.1/Kaissare in his report Exh.10 has stated that the polythene carry bag weighed 1.15 kgs. In other words, it weighed 1 kilo , 150 grams i.e. 135 grams more than what was actually seized. Although Pw.1/Kaissare stated that the substance with the polythene carry bag was 1.15 kgs., it appears that the said figure has been corrected by the learned Special Judge in the deposition of the

witness, to read as 1.015 kgs. and inspite of that, when the accused was questioned in his statement under Section 313 Cr.P.C., what was put to him was that Pw.1/Kaissare had stated that the substance weighed 1.15 kgs. As per Pw.1/Kaissare he took a representative sample of 110 grams for analysis and if the said figure is subtracted from 1.150 grams, that could have left a balance of 1040 grams, but as per the very evidence of Pw.1/ Kaissare what was found remaining was 995 grams. In case Pw.1/Kaissare had used one gram each of the 13 elongated sticks and thus 13 grams in all to carry out his analysis, then what would have remained was 1137 grams, but as already stated what remained was 995 grams. Assuming for a moment that Pw.1/Kaissare had made a mistake in mentioning the weight of the sample as 1.15 kgs. instead of 1.015 kgs., then in that event, after a deduction of 110 grams what would have remained is 905 grams and not 995 grams and in case only 13 grams were used by him for his analysis, what would have remained is 1002 grams and not 995 grams. However, it it to be noted that the report Exh.10 was prepared in the laboratory by Pw.1/Kaissare and therefore has got to be considered as more accurate and as per the said report, the sample weighed 1.15 kgs. or 1150 grams. The prosecution chose not to re-examine Pw.1/Kaissare as to how the weight of the seized article which was stated to be 1.015 kgs.(1015 grams) was found to be 1150 grams. It appears to me, that based on his report Pw.1/Kaissare had stated in his evidence that what was weighed by him was 1.15 kgs. and this was

corrected by the learned Special Judge to read as 1.015 kgs. There was no explanation from the prosecution as to how the seized article which was 1.015 kgs. turned out to be 1.15 kgs. in the laboratory thereby increasing the weight by 135 grams and which weight was subsequently found to be 995 grams. The only explanation coming from Shri Sardesai, the learned Public Prosecutor is that the seals on the sample were found in tact by Pw.1/Kaissare and had tallied with the specimen seal separately sent vide Exh.9 colly. Certainly this is not an acceptable explanation in the light of substantial variance in weight of the seized article when it was weighed by Pw.5/P.I. Paes and the same when weighed by Pw.1/Kaissare. This is not a case where there was reduction in weight on account of loss of moisture and the substance drying up as sought to be explained by the learned Special Judge. The Supreme Court in the case of **Rajesh J. Avasthi v. State of Goa (2004 Drug Cases(Narcotics) 322)** has observed that the question was not how much was seized, but whether there was actual seizure and whether what was seized was really sent for chemical analysis and since prosecution was unable to explain the discrepancy, it rendered the case of the prosecution doubtful and that what could be least said was that a serious doubt was created about the truthfulness of the prosecution case. In other words, non-explanation about this discrepancy renders the case of prosecution doubtful. This variance in weight has also got to be considered in the light of other evidence of Pw.5/P.I. Paes regarding the preparation of

the letter containing the impression seal and the custody of the impression seal itself. That is not all.

14. Although the Act provides that the seized article ought not to be retained by the Investigating Officer for a longer time than required, there is no provision in the Act which requires the Investigating Officer that he should hand over the seal as well to some other Officer. This is because the seal would be required to be used in other cases. In the case at hand, there appears to be justification for the submission that the seized article as well as the seal used, had remained in the custody of Pw.5/P.I. Paes till the sample was despatched on its way to the laboratory either at 9.30 hrs. or 13.00 hrs., conflictingly stated by Pw.5/P.I. Paes. It has been stated by Pw.5/P.I. Paes that he had handed over the seal to Pw.6/Dy. S.P. D'Souza with a letter under his signature which was duly acknowledged by him. He has produced the said letter at Exh.35. Pw.5/P.I. Paes also stated that the said letter – Exh.35 was prepared on the spot but Pw.6/Dy. S.P. D'Souza has not supported him in that respect. According to him, the letter Exh.35/Exh.42 was prepared at the Police Station. Pw.4/ Lokre, the panch witness is almost silent as regards the said letter except stating that some material was typed at the spot. In view of the conflicting versions given by Pw.5/P.I. Paes and Pw.6/Dy. S.P. D'Souza, it is quite probable that the said letter was prepared at the Police Station as stated by the latter. Pw.5/P.I.

Paes first stated that he had handed over the seal to Dy. S.P. D'Souza with a letter under his signature but in cross-examination he stated that the said letter was actually handed over to Dy. S.P. D'Souza at the Police Station. When questioned as to when he took back the seal from Dy. S.P. D'Souza, he stated that he had taken it back after about 2 or 3 days, if he remembered correctly, and added to say that it was well after the seized article was forwarded to the laboratory for analysis and at the same time stated that there was no record in the station diary on any subsequent day relating to the receipt of the seal from Dy. S.P. D'Souza. One fails to understand in case the seal was required to be given to Dy. S.P. D'Souza under a letter, as to how the same could have been brought back from him without any letter or for that matter without any record being made in the station diary. Pw.6/Dy. S.P. D'Souza though states that P.I. Paes on return to the Police Station handed over the seal to him vide Exh.35, Pw.6/Dy. S.P. D'Souza is silent as to when the said seal was returned to or taken back by Pw.5/P.I. Paes. Therefore, the story of Pw.5/P.I. Paes that he handed over the seal alongwith letter Exh.35 is not free from doubt.

15. Pw.5/P.I. Paes stated that the letter – Exh.9/34 was prepared at the spot. Pw.6/Dy. S.P. D'Souza also stated that P.I. Paes, before return to the Police Station had prepared the letter to the Chemical Analyser namely, Exh.9 colly/Exh.34, on the spot. However, when Pw.5/P.I. Paes

was questioned about the crime number having been mentioned on the said letter, Pw.5/P.I. Paes first stated that the crime number is recorded only after the registration of the offence but immediately added to say that offences relating to drugs in ANC PS are known to them as they are in the know of the following serial number. Even if some allowance is made to accept the said statement of Pw.5/P.I. Paes, inspite of the fact that there were three more seals and other Officers who could also conduct raids, because in this case the immediate Superior Officer, namely, Dy. S.P. D'Souza was accompanying Pw.5/P.I. Paes and he without being informed no other raid probably could be conducted, there are other strong indications which falsify the said claim of Pw.5/P.I. Paes and Pw.6, Dy. S.P. D'Souza that the said letter Exh.9/34 was prepared at the spot. Firstly, it has been submitted on behalf of the accused, and in my view, rightly that in case the panchanama- Exh.28 could carry the address of the place where it was made, namely, near the petrol pump as to why the letter Exh.9/34 did not have the same address in case it was prepared at the spot. The said letter gives an impression, as it has the address of the Police Station that it was typed and prepared after the arrival at the Police Station. Pw.5/P.I. Paes further stated that after return to the Police Station he filed a complaint on behalf of the State and registered the offence vide ANC PS crime no.18 of 2001. On this aspect Pw.6/Dy. S.P. D'Souza stated that Crime number is not recorded on the attached property at the spot as it is

not available at the spot and since it is given only after the offence is registered at the Police Station. The contention of Pw.5/P.I. Paes was specifically drawn to a statement on Exh.9 colly/34 wherein it was stated that “an offence vide ANC PS crime no.18/2001 under Section 20(b)(ii) N.D.P.S. Act. 1985 stands registered on behalf of the State by the undersigned on 15.12.01 at 6.00 hrs.” It has been argued by learned Advocate Ms. Collasso that this statement in the said letter Exh.9/34 is a clear indication that the said letter was typed after returning to the Police Station since otherwise Pw.5/P.I. Paes could not have known that he would reach at 6.00 hrs. to register the crime. The entire statement reproduced hereinabove in the said letter is a very clear indication to show that the letter dated 15.12.01- Exh.9 colly/34 was written after the complaint was registered at the Police Station upon the arrival of Pw.5/P.I. Paes and at 6.00 hrs. It is well said that witnesses may lie but circumstances do not. The said letter dated 15.12.01 – Exh.9 colly/34 is one of very clear indication that it was prepared after the return at the Police Station and not at the spot where the seizure was made and where it is claimed to have been prepared. It is but obvious that Pw.5/ Paes as well as Pw.6/Dy. S.P. D'Souza could not be relied upon when they stated that the said letter was prepared at the spot of seizure. If the seal was given to Pw.6/Dy. S.P. D'Souza alongwith the said letter Exh.34 and was taken back by Pw.5/P.I. Paes without any record being made, there is no reason why it should be

believed that the said seal was either not given or it was taken back immediately after it was given to Dy. S.P. D'Souza. As already stated, the evidence of Pw.5/P.I. Paes and Pw.6/Dy. S.P. D'Souza regarding the circumstances surrounding the seizure do not at all inspire confidence. In other words, the evidence of Pw.5/P.I. Paes and Pw.6/Dy. S.P. D'Souza to the effect that the letter Exh.9 colly/34 was prepared at the spot or that after the seizure and sealing of the article, the seal was handed over the Pw.6/Dy. S.P. D'Souza does not at all inspire any confidence and in the light of the discrepancy of weight found by Pw.1/Kaissare and the weight earlier found by Pw.5/P.I. Paes, the possibility that the seized article was tampered with before it was sent for analysis cannot be ruled out. Here it may again be stated that Pw.5/P.I. Paes stated that on the same morning at about 9.30 hrs. he had forwarded the sealed envelope to the office of C.I.D., Crime Branch, Panaji but then he changed the statement to say that the station diary was made at 13.00 hrs. on 15.12.01 and it is the last statement which appears is supported by an entry in the station diary and not the first statement that the sample was sent at about 9.30 hrs.

16. If Pw.5/P.I. Paes's evidence as regards some of the procedures followed by him cannot be accepted, there is no guarantee that the other procedures claimed to have been followed by him could be accepted without reservation namely, regarding the custody and transit of the seized

article from the time it was seized till the time it was despatched to the laboratory. In the context of this case, reference could be made to a judgment of the Division Bench of this Court, relied upon by learned Advocate Ms. Collasso, in the case of **Abdul Rashid v. The State of Maharashtra (1999 Drug Cases 60)**. It was a case where a sample containing 20 grams of charas was stated to have been sent to the Chemical Analyser but the Chemical Analyser found that it was only 16 grams. The discrepancy was sought to be explained but stating that it was not fatal to the prosecution as the difference was very little. However, the learned Division Bench held that it is well settled that in the prosecutions of the present type, where the evidence in respect to the identity of the contraband is very crucial , it needs to be emphasised that every aspect and more importantly, the weight of the contraband, which is something that is one of the most important features on which it can be distinguished or identified, must be attended to with a degree of precision and with a degree of correctness. Any amount of laxity, looseness or error could have fatal consequences to the prosecution. The Division Bench took note that a similar view was taken by this Court in **Amina Abdul v. State of Maharashtra(1994 B.Cr.C. 185)**.

17. In conclusion, it may be stated that there are too many disturbing features in the case of the prosecution so as to accept the same as

proved beyond reasonable doubt against the accused. It appears that the learned Special Judge has only tried to gloss over the serious inconsistencies in the case of the prosecution in order to save the case of the prosecution which in fact was unsavable as it was not free from doubt. Consequently, the accused deserves to be given benefit of doubt.

18. As a result, the appeal succeeds. The conviction and sentence imposed upon the accused by the learned Special Judge is hereby set aside. The M.O. shall be disposed of as ordered by the learned Special Judge. Accused shall be set to liberty forthwith, in case otherwise not required.

N. A. BRITTO, J.

/vpf.